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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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In re: : Chapter 11
:
CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)
et al., :
:
Debtors. : Jointly Administered
- - - - - x

**DEBTORS' OBJECTION TO US SIGNS INC.'S
MOTION FOR RELIEF FROM AUTOMATIC STAY**

The debtors and debtors in possession in the
above-captioned jointly administered cases (collectively,

the "Debtors")¹ hereby submit their objection (the "Objection") to US Signs, Inc.'s Motion for Relief from the Automatic Stay (the "Motion"). In support of the Objection, the Debtors respectfully represent:

BACKGROUND

A. The Bankruptcy Cases

1. On November 10, 2008 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code.

2. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of title 11 of the U.S. Code (the "Bankruptcy Code").

3. On November 12, 2008, the Office of the United States Trustee for the Eastern District of

¹ The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), Prahs, Inc. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address is 9950 Mayland Drive, Richmond, Virginia 23233.

Virginia appointed a statutory committee of unsecured creditors (the "Creditors' Committee"). To date, no trustee or examiner has been appointed in these chapter 11 cases.

B. The Debtors And US Signs, Inc.

4. The Debtors entered into an open account agreement with US Signs, Inc. ("US Signs") pursuant to which the Debtors contracted with US Signs for the manufacture, supply and installation of signs for the Debtors' retail store #4133, in Plainsfield, NJ.

OBJECTION

5. US Signs asks this Court for relief from the automatic stay in order to enable it to file its mechanic's lien (the "Mechanic's Lien") under New Jersey Statutes section 2A:44A-3 (the "NJ Construction Lien Law"). The Debtors respectfully request that this Court deny the Motion because perfection of US Signs' Mechanic's Lien under the NJ Construction Lien Law is stayed by the automatic stay of Bankruptcy Code section 362 and because US Signs has not established cause to lift the stay.

I. ACTS TO PERFECT LIENS ARE PROHIBITED BY BANKRUPTCY CODE SECTION 362.

6. Bankruptcy Code section 362(a)(4) prohibits "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. §362(a)(4). Thus, on its face, Bankruptcy Code section 362(a)(4) prevents US Signs from seeking to file its Mechanic's Lien.

7. However, Bankruptcy Code section 362(b)(3) provides a limited exception that permits perfection only "to the extent that the trustee's rights and powers are subject to such perfection under section 546(b). . . ." 11 U.S.C. § 362(b)(3). Section 546(b) in turn states that a trustee's avoidance powers "are subject to any generally applicable law that [] permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection." 11 U.S.C. § 546(b).

8. It is well established that the exception to the automatic stay created by sections 362(b)(3) (and 546(b)) allows perfection of a lien absent relief from the stay only if that perfection would relate back to a

date prior to the bankruptcy filing. See, e.g., In re Kearney Hotel Partners, 92 B.R. 95, 105 (Bankr. S.D.N.Y. 1988)(holding that the "546(b) exemption is applicable only if perfection relates back to a time prior to the filing of the bankruptcy petition"); see also In re Yobe Elec., Inc., 728 F.2d 207 (3d Cir. 1984)(noting the distinction between statutes under which perfection relates back, such that perfection does not violate the automatic stay, and statutes where perfection does not relate back, such that perfection violates the automatic stay); In re U.S. Leather, Inc., 271 B.R. 306, 308 (Bankr. E.D. Wis. 2001)(noting that in order for 546(b) to apply, "[t]he lien must be in existence before the petition is filed and perfected thereafter, and applicable state law must clearly provide for retroactive perfection").

9. The NJ Construction Lien Law does not relate back. The law provides that, in order for a lien to attach and be enforceable, the claimant must file a lien claim with the county clerk. N.J. Stat. Ann. § 2A:44A-6 (West 2008). It further provides that "the lien claim shall attach to the interest of the owner from and

after the time of filing of the lien claim." N.J. Stat. Ann. § 2A:44A-10 (emphasis added). Thus, under the NJ Construction Lien Law, US Signs' Mechanic's Lien would be perfected only as of the date of filing, which would necessarily fall after the Petition Date. As a result, US Signs' is prohibited by the automatic stay from taking action to perfect the Mechanic's Lien.

II. US SIGNS HAS NOT ESTABLISHED CAUSE TO LIFT THE AUTOMATIC STAY.

10. US Signs' request for relief from the automatic stay should be denied because US Signs has failed to show cause for such relief.

11. "The party requesting relief from the automatic stay under § 362(d)(1) has the burden of proving that cause exists for relief from the automatic stay." In re Trius Corp., 47 B.R. 3, 5 (Bankr. D.S.C. 1984); see In re Mazzeo, 167 F.3d 139, 142 (2d Cir. 1999); In re Milstein, 304 B.R. 208, 212 (Bankr. E.D. Pa. 2004).

12. US Signs' only asserted basis for cause is that it faces a deadline of January 3, 2009 to file its lien claim and that it will be "irreparably harmed

without relief from the automatic stay . . .” Motion at ¶ 21. However, “[c]onclusory statements that a continuance of the stay will cause irreparable harm or that injury will occur if relief is denied are insufficient to establish cause.” In re Texaco Inc., 81 B.R. 820, 829 (Bankr. S.D.N.Y. 1988). Accordingly, US Signs has failed to satisfy its burden of proof.

13. Moreover, the purpose of 546(b) “is not to permit a creditor, who itself has taken no action prior to the filing of the case, to perfect a lien subsequent to the filing of the case.” In re Valairco Inc., 9 B.R. 289, 294 (D.N.J. 1981). Here, US Signs concedes that all work was supplied no later than October 3, 2008, which is more than one month prior to the Petition Date. Motion at ¶ 9. Thus, there was nothing preventing US Signs from perfecting the Mechanic’s Lien prior to the Petition Date. To permit US Signs to utilize Bankruptcy Code 546(b) as a means to perfect the Mechanic’s Lien would derogate from the section’s purpose and Congressional intent. See H.R. Rep. No. 595, 95th Cong., 1st Sess., at 371 (1977)(“The rights granted to a creditor under [section 546(b)]

prevail over the trustee only if [the creditor has perfected its interest in property post-petition], and that perfection relates back to a date that is before the commencement of the case." (emphasis added)).

14. Other courts have denied requests to lift the stay to allow perfection of a lien where perfection does not relate back. See, e.g., Matter of Peter J. Schmitt Co., Inc., 154 B.R. 47, 49-52 (Bankr. D. Del. 1993) (denying request to lift stay to allow perfection of a lien under Ohio lien law because perfection would not relate back); In re Shore Air Conditioning and Refrigeration Inc., 18 B.R. 643, 644 (Bankr. D.N.J. 1982)(denying request to lift stay to allow perfection of a lien under New Jersey lien law because perfection would not relate back); In re Valairco, 9 B.R. 289 (same). US Signs has presented no basis for its requested deviation from this well-established precedent.

15. Accordingly, the Debtors respectfully request that the Court deny US Signs' request to lift the automatic stay to allow it to perfect its lien.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an order denying the relief requested in the Motion.

Dated: December 19, 2008

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